JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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ALIENS.

Helen Bugajewitz v. Louis Adams, 33 Sup. Ct. Reptr, 607. *Constitutionality of act for deportation of immoral alien women.* The prohibition of U. S. Const. art. 1, sec. 9, against ex post facto laws, has no application to provisions like those of the act of Feb. 20, 1907, sec. 3, and the amendatory act of March 26, 1910, sec. 2, for the deportation of alien women found practicing prostitution after their entry into the United States.

APPEAL.

Ward v. State. Ind. 101 N. E. 809. *Burden of showing prejudice.* An appellant who complains of error preventing a fair trial must make an affirmative showing a prejudicial error.

BANK REPORT.

State v. Sharp, Minn., 141 N. W. 526. *Knowledge of Falsity.* A statute penalized the making of false bank reports. It did not specifically make actual knowledge of the falsity, or criminal intent, an essential ingredient of the offense. A bank president was indicted for making a false report to the superintendant of banks. The indictment did not allege that he knew the report was false. On demurrer to the indictment it was held that the statute was a police regulation which imposed a penalty irrespective of an intent to violate it. The object was to require a degree of diligence for the protection of the public which would render violation impossible. It was the duty of the president to know whether his report was true or false. If it was false, though he did not know it, he violated the statute. The ordinary rule of interpretation, that there must be a criminal intent, does not apply to such statutes. To apply it would almost destroy their effectiveness.

DISTURBANCE OF PUBLIC ASSEMBLAGE.

People v. Malone. 141 N. Y. Supp. 149. *"Willful disturbance."* Defendant, a suffragette of education, attended a political meeting at which the candidate of the Democratic national convention for President for the ensuing election was to speak. During his address she arose from her seat and asked him to state his position on woman suffrage. The speaker declined to discuss the question as a state issue, and because he was there only to discuss national questions. She was requested by the chairman of the meeting to resume her seat; but she remained standing, made a repetition of her request, and addressed a further question to the speaker relative to the same subject. The meeting was thrown into an uproar, and accused was ejected and arrested. Held that, while her acts prior to her being requested to resume her seat were proper, her refusal to do so and her continuance to interrogate the speaker constituted a "willful disturbance" of the public assembly, in violation of Penal Law, section 1470.

ERROR PREJUDICIAL.

State v. Hutchison, Minn. 141 N. W. 483. *Erroneous Instruction.* The

state proved that the defendant had passed a jewelry store several times in one day, and had looked into the window; the store was broken into that night and several watches stolen; defendant offered one of the watches for sale in another town the next evening, saying that his sister had given it to him; he was arrested the same evening and produced all the stolen watches, saying that he had bought them from a stranger at the railway station in the town where they were stolen; and that he had no money when arrested. Defendant adhered to the story that he bought the watches; there was evidence that he might have had money at that time; and there was strong evidence that he was a boy of very good habits and character. The trial court charged in effect that unless defendant's explanation of his possession of the watches was reasonable he should be convicted. Held the question was not whether it was reasonable but whether it was true. "An unreasonable story may be a true one, and reasonable and plausible stories are often false ones." While the court hesitated to reverse a conviction on errors in the instructions, or in the admission of evidence, where the evidence of guilt is strong, it cannot itself try the defendant and thus deprive him of his right to a trial by jury, and to have the evidence weighed by a jury under instructions that are reasonably accurate and not misleading. Defendant's guilt was not conclusively proven, and it is not clear that the verdict would have been the same under proper instructions. Hence the order denying the new trial was reversed.

ERROR WITHOUT PREJUDICE.

State v. Wilson, Ia., 141 N. W. 337. *Errorless Instruction.* In a trial for murder the trial court charged the jury that when the killing is done with a sedate, deliberate mind, and in pursuance of a design previously formed, the presumption of malice is conclusive. The appellate court declined to approve the instruction, as the presumption may be rebutted by proof that a killing under such circumstances was in self-defense. But there was no evidence of self-defense in this case, as the defendant denied that he killed deceased, hence the error was not prejudicial. Under a statute requiring a decision without regard to technical errors which do not affect the substantial rights of the parties, the conviction was affirmed.

Swartz v. State, Okla. Cr. App., 120 Pac. 1029. *Incompetent Evidence Admitted.* A prosecution for statutory rape turned upon the age of the prosecuting witness. Her parents testified to the date of her birth, making her under sixteen, the statutory age of consent, at the time of the offense. Over the defendant's objection the state was permitted to put in evidence an entry in the family Bible corroborating this testimony. The entry had originally been made in another Bible by a preacher. That Bible became worn out and the entries in it were copied by another preacher into a new Bible, which was the one offered in evidence. A witness for the defendant testified that about the time of the offense the prosecutrix had told him she would be eighteen her next birthday. She denied making this statement. Held, it was error to admit the Bible record, as that was secondary evidence, and the best evidence available and had been introduced in the testimony of the prosecutrix's parents. But as the testimony of the parents was positive, unshaken by a rigid cross-examination, and had not been contradicted, its admission was not prejudicial to the substantial rights of the defendant. "There is no doubt of his guilt of the crime charged, and his escape from punishment would be a miscarriage of justice." Hence under a

statute providing "On an appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." the conviction was affirmed.

EVIDENCE.

People v. Richardson, Cal., 120 Pac. 20. *Testimony of Mother Incidentally Bastardizing Child.* Defendant was convicted of providing a drug with intent to procure a miscarriage. The woman's testimony showed illicit relations with the defendant from August, 1908, to May or June, 1909, indications of pregnancy in March and April, 1909, administration of the drug by defendant in May, her marriage to a third person in August, and the birth of a child in December, 1909. On appeal the defendant contended that as this testimony tended to prove the illegitimacy of the child it could not be considered. Held that the rule prohibiting such testimony does not apply to cases in which the legitimacy of the child is not directly in issue. This testimony proved a motive for the commission of the crime with which the defendant was charged, it did not affect the legal rights of the child. Further, most of the testimony was given without objection, and the particular objection raised on appeal was not suggested at all in the trial court.

EXTRADITION.

Prosecution for Crimes Not Named in the Extradition Papers. In the May issue of this Journal Wm. H. Baldwin discusses whether it is lawful in Pennsylvania to bring a man back into the state under the desertion act of 1903 and then prosecute him under the old law of 1867, and concluded that it is not so. An illuminating discussion of the same general principle will be found in *In re Flack,* 88 Kansas 616, decided January 11, 1913, which overrules *State v. Hall,* 40 Kansas 338. The syllabus in the Flack case is: "A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, and who, on demand of the executive authority of the state from which he fled, shall be delivered up and removed to the state having jurisdiction of the crime, may there be prosecuted for crimes other than the one specified in the demand for his delivery without first giving him a reasonable opportunity to return to the state which surrendered him." The Hall case had held that an alleged fugitive may be prosecuted "only for the offense for which he was extradited until after he has had reasonable time and opportunity afforded him to return to the place from which he was extradited." Flack was arrested in New York for forgery and brought back to Kansas, and while awaiting trial eleven other prosecutions were instituted against him for false and fraudulent entries on the books of his bank. He brought habeas corpus to discharge him from custody as to the eleven cases not covered by the extradition proceedings.—J. C. Ruppenthal, Twenty-third Judicial District, Russell, Kansas.

HOMICIDE.

Killing in an Attempt to Commit a Felony. Where accused menacingly pointed his gun at decedent's brother, and decedent attempted to interfere, when accused turned his gun and immediately shot and killed decedent, and then turned and shot the brother, inflicting a wound not fatal, the felony committed on the brother by menacingly pointing the gun at him was distinct from the homicide, and was within Penal Law, Sec. 1044, making a killing "murder in

the first degree" when committed by a person engaged in the commission of or in an attempt to commit a felony. (Cullen, C. J., and Hiscock, J., dissenting).

State v. Saxon, Conn. 86 Atl. 590. *Mental Capacity.* A requested charge in a homicide case that if the jury find that the accused's mentality was very low, and not as high in some departments as a child of six years old, "the jury should acquit," was properly refused as not stating the proper measure of criminal responsibility, in that it did not point out the departments in which the mentality of accused must be inferior to that of a six year old child to relieve him from criminal responsibility.

INDICTMENT AND INFORMATION.

John Gund Brewing Co. v. U. S., 204 Fed. 17, Rev. St. Sec. 3242 (U. S. Comp. St. 1901, P. 2094), makes it an offense for a person to engage in the business of a wholesale liquor dealer without having paid the "special tax" provided by law. Held, that an indictment charging defendant with engaging in the business of a wholesale dealer in malt liquors without having paid the tax was not demurrable because the tax was not referred to as a "special tax" as in the statute.

People v. Smith, Ill. 101 N. E. 957. *Variance, idems sonans, proof.* The variance between an indictment charging a crime against nature, and alleging the Christian name of the victim to be "Rosetta," and the proof that her name is "Rosalia," is fatal, and the question of variance need not be raised on the trial to be available, since the proof shows a crime, if any, against a person other than the one named in the indictment.

The doctrine of *idem sonans* may not be invoked where an indictment charges the name of the person injured to be "Rosetta," while the proof shows that her name is "Rosalia."

People v. Rosen, N. Y. 101 N. E. 855. *Habitual Criminal Act Construed.* Penal Law, Sec. 1020, provides that a person convicted of a felony, who has previously been convicted in this state of any other crime or convicted of a misdemeanor after having been five times convicted of a misdemeanor in this state, may be adjudged in addition to any other punishment, to be an habitual criminal. Section 1021 makes habitual criminals subject to the supervision of every judicial magistrate of the county and of the supervisors of the poor of the town where they may be found; and Code Crim. Proc. Sec. 485a, makes it the duty of the court, on the conviction of a prison offense, to ascertain by examination under oath before sentence whether such convict has learned any trade, and other facts the causes of criminal conduct. Held, that to justify a sentence as an habitual criminal it was necessary that the indictment charge a prior conviction, and that defendant be convicted on such charge; the information developed on examination before sentence not being sufficient.

People v. Archibald, Ill. 101 N. E. 582. *Abatement of Nuisance.* Criminal Code (Hurd's Rev. St. 1911, c. 38), Sec. 221, enumerates certain acts which are declared to be public nuisances, and Sec. 222 declares that whoever shall be convicted of erecting any such nuisance shall be fined for the first offense, and every such nuisance when a conviction therefor is had in a court of record may be abated by the sheriff by the order of the court at the expense of the defendant. Held, that the abatement of a public nuisance under such section was not a part of the punishment for the criminal offense, and hence a prosecution

therefor was not limited to indictment under constitution, Art. 2, Sec. 8, requiring an indictment where the punishment exceeds fine and imprisonment in the county jail.

JURY.

State v. Wilson, Ia., 141 N. W. 337. *Duty to Follow Law and Evidence.* A jury were instructed, "The fact that you have power to return a verdict finding a lesser crime or acquittal is alone no excuse for using such power. The lower conviction or an acquittal should not rest on the notion that you can do as you please arbitrarily." Objection was taken on the ground that the jurors "are at liberty to acquit at pleasure; that is exactly what they have a legal right to do." Held that while they have the power to act arbitrarily, they have no right, either legal or moral, to do so. They do have the right to say which of the witnesses they will believe, and which they will not believe, and have a right to disbelieve all of them. Whether they could be called to account if they did act arbitrarily need not be determined, but in a prior case this court approved an instruction that unless they followed the law as given by the court they would be guilty of perjury.

JUVENILE COURT LAW.

Ex parte Powell, Okla. Cr. App., 120 Pac. 1022. *Constitutionality.*. A boy under fourteen years of age pleaded guilty to an information charging burglary and was sentenced to two years in the State Training School. The statute under which this was done had been repealed by the Juvenile Court Law. Kate Barnard, State Commissioner of Charities and Corrections, applied for a writ of habeas corpus to secure his discharge. It was contended that the Juvenile Court Law was unconstitutional. After holding that the title of the act was sufficient, and that the act did not interfere with the constitutional jurisdiction of the district court, the court held that the legislature had power to enact the law. The state has power to commit minors to juvenile institutions (1) as a punishment for crime; (2) in quasi criminal proceedings, when the minor is incorrigible and beyond domestic control, not for punishment but for reform and moral training; (3) for care and guardianship, when the minor is vagrant and destitute, or in some jurisdictions neglected, ill-treated and not properly cared for by his guardian, appointed or natural. In the second and third classes of cases the state acts as *parens patriae.* "The moment a child is born he owes allegiance to the government of the country of his birth, and is entitled to the protection of that government for his person, as well as his property." By such a statute the legislature gives this protection.

LARCENY BY TRICK.

Bivens v. State, Okla. Cr. App., 120 Pac. 1033. *Distinguished from Embezzlement. Jurisdiction.* Prosecutor and defendant slept in the same room in Texas. Prosecutor was anxious about his money, defendant said he would hide it for him, and prosecutor gave it to defendant for that purpose. It was to be returned the next day. Early the next morning they took a train into Oklahoma. There defendant professed to have lost the money. When he was arrested that evening he threw the pocketbook containing the money away, and when it was picked up, claimed the money as his own. Held that the evidence justified a finding that the defendant meant to steal the money when he received it, rather than to keep it for and return it to the prosecutor, so that the crime committed was larceny rather than embezzlement, under the Oklahoma

statutes. While the larceny was committed in Texas, yet under a statute providing that any person who steals property in any other state or country and brings the stolen property into Oklahoma may be convicted and punished as though the larceny had been committed in Oklahoma, the defendant was properly convicted of larceny.

PLEA.

People v. Afton, Ill. 101 N. E. 557. *Withdrawal and Re-entry.* It being apparent that the parties and the court considered and treated the overruling of the motion to quash the indictment as a reinstatement of the plea, withdrawn for the purpose of such motion, the trial having thereupon proceeded without objection, formal re-entry of the plea was not necessary.

RAPE.

People v. Liedecker, Ill. 101 N. E. 556. *Age; presumptions.* Where, under an indictment charging him with forcible rape, and averring that he was then and there a male person of the age of 16 years and upwards, accused was convicted, but the verdict failed to find his age, it will be presumed on appeal, there being no bill of exceptions, that accused was not a minor, and hence the jury were not required to find his age: Act of June 18, 1891 (Laws of 1891, p. 52), establishing a reformatory and requiring the jury to find whether the defendant is between the ages of 10 and 21 years, applying only to minors—the indictment merely charging that accused was 16 years of age or more.

SHERMAN ANTI-TRUST ACT.

United States v. New Departure Mfg. Co., 204 Fed. 107. *"Engage in Conspiracy."* The Sherman Anti-Trust Act, July 2, 1890, c. 647, Sec. 1, 26 Stat. 209 (U. S. Comp. Stat. 1901, p. 3200), provides that every contract, combination or conspiracy in restraint of trade or commerce among the several states is illegal, and that every person who shall make any such contract or engage in any such combination or conspiracy shall be guilty of a misdemeanor. Section 2 declares that any person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce within the several states, or with foreign nations, shall be guilty of a misdemeanor. Held, that the phrase, "engage in such combination or conspiracy," in Section 1, was used in a broad sense, and included, not only such persons as initiated such a conspiracy, but also those who afterwards engage therein; and hence an indictment, charging that defendants were engaged in a conspiracy among themselves to control and monopolize interstate commerce in the manufacture and sale of coaster brakes among the several states, followed by an allegation of overt acts tending to effectuate the conspiracy, was not defective for failure to charge directly the formation and existence of the conspiracy, the words "engage in" as so used, signifying to embark in, take part in, or enlist in, meaning substantially the same thing as to conspire.

SODOMY.

Glover v. State, Ind. 101 N. E. 529. *Statement of Facts in Indictment.* An affidavit charging the crime of sodomy need not state the facts, it being sufficient to follow the words of the statute; such crime being an exception to Lurns Ann. St. 1908, Sec. 2040 (Acts 1905, c. 169, Sec. 169), providing that an

indictment or affidavit must contain a statement of the facts constituting the offense charged.

WITNESSES.

People v. Van Zile, 141 N. Y. Supp. 168. *Impeachment—"Conviction."* Where one accused of crime took the stand in his own behalf, and testified that he had never before been convicted of crime, the fact that he had been indicted and convicted by a jury could not be elicited to impeach his credibility, where the conviction had been reversed on appeal; for the expression "conviction" means a conviction pursuant to law, and upon reversal the erroneous conviction became a nullity, and accused was restored to the status of an innocent man.

Recalling the Judiciary to Practical Administration of Law—Public opinion is gradually "recalling" our judiciary to a more practical administration of the law. This is well illustrated in two recent federal decisions, *Hyde v. United States,* 225 U. S., 347, and *Brown v. United States,* in the same volume, page 392. Both involve the crime of conspiracy, and the question raised was whether defendants could be tried in a state where overt acts had been committed, although the conspiracy was formed in another jurisdiction. The court divided five to four. The majority sustained convictions in the states where the overt acts were committed. In the course of the opinion the following language was used, indicating the change of viewpoint as to the practical administration of criminal law:

"It is not an oppression in the law to accept the place where an unlawful purpose is attempted to be executed as the place of its punishment, and rather conspirators be taken from their homes than the victims and witnesses of the conspiracy be taken from theirs. *We must not, in too great solicitude for the criminal, give him a kind of immunity from punishment because of the difficulty in convicting him.* * * * The possibility of such a result repels the contention and demonstrates that to yield to it would carry *technical rules and rigidity of reasoning* too far for the *practical administration* of criminal justice. * * * *The constitution of the United States is not intended as a facility for crime."*

A like attitude is shown in the recent decision of the Circuit Court of Appeals of the Eighth Circuit, *McKinney v. United States of America:* There a motion was made to quash an indictment upon the ground that no competent evidence was produced before the grand jury. The trial court denied the motion, and its action is sustained. In the course of the opinion, the following sensible view is expressed by Circuit Judge Hook: "There is an unfortunate tendency in criminal jurisprudence to raise minor matters to the dignity of substantial rights. The plain safeguards against governmental and private oppression have become by judicial action so embedded in non-essential additions and technical refinements that their true limitations are not always clear, and it not infrequently happens that criminal trials become mere adroit contests, in which substance yields to form and the search for truth is diverted to and ends in collateral inquiries. Many an intelligent person, accused of crime, has been discharged for reasons so abstruse as to be beyond his comprehension, and the triumph has not been of innocence, but of ingenuous subtlety. Of course fundamental safeguards should not be frittered away, but

the growth of judicial construction should also be with due regard to the just rights of society and the practical conduct of trials."

Liability of Militia for Acts Under Orders.—A decision determining the civil liability of members of the militia for acts performed pursuant to orders in actual service which critics say must tend to dishearten the militia and render it inefficient was handed down by the Court of Appeals of Kentucky, in *Franks vs. Smith,* in which the court held that the defendant militiamen made an unjustifiable arrest and were liable for false imprisonment.

The state militia had been called out to quiet night riding, and a sergeant and a number of privates were detailed by their captain to watch a certain highway at night, with orders if, during any unusual hour of the night they encountered men traveling the highway in numbers of more than two to halt them, receive their explanation and, if necessary, to search them, and if they were found carrying concealed weapons to arrest and take them into camp. About midnight defendant and his fellow soldiers encountered plaintiff and five others traveling on the highway, and after halting and searching them found pistols in the buggy of the plaintiff and one other of the party. Pursuant to orders they were arrested and taken to camp and the next day turned over to the civil authorities on the unfounded charge of carrying concealed weapons. The hearing failed to show that the plaintiff had theretofore committed or was about to commit a public offense of any kind. The court accordingly held that since the arrest was unjustifiable those participating in it were liable for false imprisonment.

The court lays down the proposition of law that members of the militia when called out by the Governor to suppress a riot or insurrection are merely peace officers, with no wider authority and subject to the same discretion as peace officers. The court said:

"After mature consideration we have reached the conclusion that any military order, whether it be given by the Governor of the state or an officer of the militia or a civil officer of a city or county, that attempts to invest either officer or private with authority in excess of that which may be exercised by peace officers of the state is unreasonable and unlawful; and if it is obeyed the officer or private giving obedience subjects himself to such punishment and liability as the penal and civil laws of the state might inflict against a private individual guilty of similar transgression of the law or rights of the citizen."

The Kentucky decision is contrary to the Supreme Court of Pennsylvania in *Commonwealth vs. Shortall* and the Supreme Court of Colorado *in re Moyer.* The Shortall case proceeded on a different basis from the Kentucky case, which is that when the Governor is obliged to call out the militia a state of "qualified martial law" supervenes, and acts done by members of the militia pursuant to orders which are required by or are reasonably suitable to the suspension of civil conditions do not subject the doers to the ordinary civil liabilities. In that case it was held that a militiaman who was stationed to guard a residence which, during a time of rioting and disorder, had been dynamited and against which threats had been made to repeat the offence, with orders to shoot any persons found prowling about the house, was not guilty of a crime because he shot a person who approached the building and refused to obey his command to halt.